# Local Government Mediation — The Ugly Duckling of RMA Dispute Resolution

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*This article considers the use of alternative dispute resolution mechanisms within the Resource Management Act 1991 and related changes proposed in the Resource Legislation Amendment Bill 2015. The resolution of environmental disputes outside of formal local government or court processes is clearly intended by the Resource Management Act. However, local governments make scant use of mediation to resolve policy, plan or consent disputes. In contrast the Environment Court refers the majority of appeals from policy, plan or consent decisions by local government to some form of alternative dispute resolution, chiefly mediation. This paradox raises the question: If the Environment Court is directing the majority of decision disputes to mediation, why was mediation not initiated at first instance by local government? The reasons are uncertain but power imbalances and the well-trodden path to the Environment Court are strong factors. Court processes can result in delays, causing both opportunity and financial loss. However, local governments are closer in time to the dispute and are responsible for the efficacy of the conditions of any negotiated outcome from mediation, court-arranged or not, therefore they are better positioned to initiate mediation that results in best outcomes. Attention is then drawn to the related changes proposed in the Resource Legislation Amendment Bill. Surprisingly, given the policy that*

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*processes are timely, efficient, consistent, and cost-effective, the under-utilised provisions for local government mediation remain untouched. Instead the proposed changes, including making participation mandatory, further bolster the Environment Court's use of alternative dispute resolution. Comparable jurisdictions furnish instructive examples of legislative support for alternative dispute resolution and case studies of local government environmental mediation. It is suggested that the use of mediation by local government can shift public engagement to first-instance planning and consent decisions, result in outcomes agreeable to all parties, save time and money, and reduce appeals. Two recent cases before the Environment Court have features suggesting local government mediation could have achieved better outcomes. More could be achieved through initiatives to bolster local government mediation such as adding a new schedule to the Resource Management Act for alternative dispute resolution.*

## 1. INTRODUCTION

The Hastings District Council directed residents in Havelock North to boil their water on 12 August 2016 following a campylobacter outbreak sourced from the town's water supply.[1] Sparking an independent inquiry, the water crisis affected thousands of residents causing vomiting and diarrhoea, two deaths were linked to the outbreak, and businesses reliant on the town's water supply were forced to close during the crisis losing tens of thousands of dollars.[2] With evidence the contamination came from the faeces of deer, sheep or cattle, the crisis has focused attention on farm intensification and debates over land use, water degradation and who should pay for water pollution.[3] The Havelock North water crisis embodies environmental disputes. The issues are many, requiring solutions for the present and future. The parties are multiple whose interests vary from environmental protection to economic development. Finally, there are strong elements of public law and public interest.

1 Hastings District Council, Havelock North Water Crisis <www.hastingsdc.govt.nz/hnwc>.

2 S Sachdeva "Independent inquiry into Havelock North water contamination gets under way" *Stuff: Politics* (New Zealand, 12 September 2016) <http://www.stuff.co.nz/national/politics/84170801/independent-inquiry-into-havelock-north-water-contamination-gets-under-way>.

3 L Owen "What went wrong in Havelock North? Part two" TV3: Newshub (New Zealand, 20 August 2016) <http://www.newshub.co.nz/home/shows/2016/08/what-went-wrong-in-havelock-north-part-two.html>.

The Resource Management Act 1991 (RMA) is New Zealand's principal statutory instrument for managing the environment. Among the processes available under the RMA to address environmental disputes is mediation, which is proving to be an effective process used by the Environment Court (the Court) to help resolve environmental conflicts and disputes. In contrast, local governments rarely initiate mediation to resolve environmental disputes. Shunned like the ugly duckling in Hans Christian Andersen's 1843 fairy tale, local government-arranged mediation (local government mediation) is disregarded as a process for resolving disputes at first instance.

This article examines alternative dispute resolution (ADR) processes within the RMA, of which mediation is chief, by briefly surveying the purpose, principles and responsibilities under the RMA. ADR is then introduced and discussed in relation to environmental disputes, whose unique characteristics influence the form of the ADR process, and in mediation the role of the mediator. The resolution of environmental disputes outside of formal local government or court processes is clearly intended within the RMA and the relevant provisions are introduced. Local governments make scant use of mediation to resolve policy, plan or consent disputes under the RMA. In contrast the Court refers the majority of cases involving policy, plan or consent decision disputes to some form of ADR process for resolution, normally mediation. This apparent paradox raises the question: If the Court is directing the majority of policy, plan or consent decision disputes to mediation, why was mediation not initiated at first instance by local government? Local governments appear to be better positioned than the Court to resolve environmental disputes through mediation because local governments are responsible for the efficacy of the conditions of any negotiated outcome, are closer in time and location to the dispute, and will likely have an ongoing relationship with disputants.

Attention is then drawn to the Resource Legislation Amendment Bill 2015 (the Bill).[4] The emphasis in the Bill is on processes that are proportional and adaptable so that resource management decisions are robust and durable. Under the Bill the Court's use of ADR is strengthened; in particular a "sea change" is introduced by making participation mandatory in any court-arranged ADR process. Surprisingly, in view of the policy that processes be timely, efficient, consistent, and cost-effective,[5] the under-utilised provisions for local government mediation remain untouched. Comparable jurisdictions furnish instructive examples of legislative support for ADR processes and case studies of first-instance environmental mediation. Two recent cases before the Environment Court have recognisable features suggesting local government mediation may have achieved better outcomes for the parties. Finally, it is

4 Resource Legislation Amendment Bill 2015 (101-1).

5 Clause 8.

suggested that the use of local government mediation better achieves objectives within the Bill. To bolster local government mediation it is recommended that a new schedule dedicated to ADR be added to the RMA, legal counsel should be trained in environmental dispute resolution, local government mediation should be incentivised, and local governments need to build ADR capacity. Hans Christian Andersen's ugly duckling surprised his detractors by growing into a majestic swan; likewise it is suggested that inert within the RMA is the potential of local government mediation to be a timely, efficient, consistent, and cost-effective process for dispute resolution at first instance.

## 2. RESOURCE MANAGEMENT ACT 1991

Intended to provide protection for the environment to ensure fairness to future generations and sustainable development,[6] the RMA came into force on 1 October 1991. It integrated the existing laws relating to the management of land, water and soil, minerals and energy resources, the coast, air, and pollution control.[7] The RMA contains the guiding purpose and principles for resource management, and defines the responsibilities of central government, local government, and the Environment Court in resource management. Not without controversy, the RMA has had 20 amendments since 1991.

### 2.1 Purpose and Principles

The purpose and principles are contained in pt 2 of the RMA.[8] The purpose is to promote the sustainable management of natural and physical resources.[9] Sustainable management embraces the concept that the present generation is able to provide for their own wellbeing while sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations.

Sections 6, 7 and 8 provide guiding principles under the RMA. Section 6 requires all persons exercising functions and powers under the Act are to recognise and provide for matters of national importance.[10] Matters of national

6 G Palmer "The Resource Management Act — How we got it and what changes are being made to it" [2014] RM Theory & Practice 22 at 34. Sustainable development is defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs": World Commission on Environment and Development *Our Common Future* (Oxford University Press, Oxford, 1987) at 41.

7 Resource Management Bill 1989 (224-1) (explanatory note) at i.

8 Resource Management Act 1991, pt 2 [RMA].

9 Section 5.

10 Section 6.

importance include the preservation of the natural character of the coastal environment, wetlands and lakes, and rivers and their margins;[11] the protection of outstanding natural features and landscapes;[12] the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;[13] the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers;[14] the relationship of Māori and their culture and traditions with their ancestral lands, water sites, waahi tapu,[15] and other taonga;[16] the protection of historic heritage;[17] and the protection of customary rights.[18]

Section 7 contains a list of matters that persons exercising functions and powers under the RMA are to have particular regard to. These include kaitiakitanga,[19] the ethic of stewardship, the efficient use and development of natural and physical resources, the efficient use of energy, the maintenance and enhancement of amenity values, intrinsic values of ecosystems, the maintenance and enhancement of the quality of the environment, any finite characteristics of natural and physical resources, the protection of the habitat of trout and salmon, the effects of climate change, and the benefits derived from the use and development of renewable energy. Furthermore, s 8 requires that the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) are to be taken into account.

### 2.2 Responsibilities

Under the RMA central and local government are responsible for the development of policy and plans to sustainably manage natural and physical resources.[20] Regulated activity under the plans is permitted by local government through the resource consent process.[21] The Court is an appellate court under the RMA mostly handling disputes over policy, plan or consent decisions.[22]

11 Section 6(a).
12 Section 6(b).
13 Section 6(c).
14 Section 6(d).
15 Section 6(e). "Waahi tapu" refers to places considered sacred to Māori.
16 Section 6(e). "Taonga" can refer to objects or natural resources highly prized by Māori.
17 Section 6(f ).
18 Section 6(g).
19 Section 7(a). "Kaitiakitanga" refers to the exercise of guardianship by the local Māori people of an area in accordance with Māori customary law in relation to natural and physical resources; and includes the ethic of stewardship.
20 Parts 4 and 5.
21 Part 6.
22 Parts 11, 11A and 12.

### *2.2.1 Central government*

Central government sits at the top of the planning hierarchy and is responsible for the preparation of national policy statements providing nationwide policy guidance for local government in dealing with specific resource management issues,[23] national environmental standards setting nationwide technical standards to be followed in managing a particular resource or environmental issue,[24] and the New Zealand coastal policy statement which sets out requirements for local government in their day-to-day management of the coastal environment.[25]

### *2.2.2 Local government*

Local government in New Zealand is comprised of 78 separate bodies: 11 regional councils, 61 territorial authorities, and six unitary councils who are territorial authorities with regional council responsibilities.[26] The Auckland Council is an example of a unitary council. Regional councils are the second tier of the planning hierarchy and each prepare regional policy statements (RPSs),[27] regional plans (RPs)[28] and regional coastal plans (RCPs).[29] RPSs identify significant regional resource management issues, outline objectives, and set policies to achieve those objectives. RPs set objectives and rules for managing specific resources such as water, land and air. RCPs do the same for managing coastal resources. Regional councils act as consent authorities issuing resource consents where their permission is required.[30]

Territorial authorities represent the third tier of the planning hierarchy. They prepare district plans (DPs)[31] setting out objectives, rules and policies governing land use. Territorial authorities also act as resource consent authorities where their permission is required.[32]

23 Section 45.
24 Section 43.
25 Sections 56 to 58.
26 Local Government New Zealand "Local government in New Zealand" (26 September 2016) <http://www.lgnz.co.nz/home/nzs-local-government/>.
27 RMA, ss 59–62.
28 Section 63.
29 Section 64.
30 Section 2.
31 Sections 72–75.
32 Section 2.

*2.2.3 Environment Court*

The Court was established under the Resource Management Amendment Act 1996, replacing the Planning Tribunal.[33] It is an appellate court, meaning that it will consider matters afresh.[34] Most Environment Court hearings involve appeals from first-instance policy, planning or resource consent decisions, but it also can determine enforcement proceedings, declarations, and abatement notices.[35] The Court may regulate its own proceedings,[36] and is to do so in a way that promotes timely and cost-effective resolution.[37] Proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency.[38] The Court and Environment judges have the same powers that a District Court has in the exercise of its civil jurisdiction.[39]

## 3. ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR processes enable parties to resolve their disputes without recourse to the adversarial litigation model typical of the courtroom. Mediation is one such example often used to resolve environmental disputes. Environmental disputes have characteristics different to traditional commercial and civil disputes, influencing the form mediation takes. Though frequently used, environmental mediation is not a panacea for all environmental disputes.

### 3.1 ADR Definition

ADR can be described as a structured dispute resolution process that may involve third-party intervention which does not impose a legally binding outcome on the parties.[40] Parties retain control over the process and outcome with the intention to collaborate and achieve a similar or better result than

33 Section 247.

34 Presently a substantive hearing before the Environment Court is not an "appeal" in the traditional sense but really amounts to an investigation de novo. *Amuri Irrigation Co Ltd v Canterbury Regional Council* [2015] NZEnvC 164 at [55]; *Ross v Number 2 Town and Country Planning Appeal Board* [1976] 2 NZLR 206 (CA) at 210.

35 Environment Court "Jurisdiction of the Environment Court" (7 September 2016) <https://environmentcourt.govt.nz/about/jurisdiction/>.

36 RMA, s 269(1).

37 Section 269(1A).

38 Section 269(2).

39 Section 278.

40 K Mackie and others *The ADR Practice Guide: Commercial Dispute Resolution* (3rd ed, Tottel Publishing, UK, 2007) at 9.

might have been achieved in a tribunal, with less cost.[41] Examples include unilateral action, negotiation, mediation, conciliation, evaluative processes, and arbitration.[42]

Mediation is the chief ADR process available under the RMA and therefore receives specific mention. Mediation is a process led by a neutral third party who works with the disputing parties to help them explore and, if appropriate, reach a mutually acceptable resolution of some or all of the issues in dispute.[43] Five underlying philosophies of mediation are confidentiality, voluntariness, empowerment, neutrality, and a unique solution.[44] Confidentiality is a cornerstone of the mediation process enabling parties to "lay bare their souls" to one another without fear of any admissions being used against them at trial should a settlement not be reached.[45] Voluntary participation means that the parties have entered into the mediation of their free will and as such they are more likely to cooperate to find a mutually agreeable resolution.[46] Power imbalances between parties are inevitable but where the parties are empowered in the mediation to make their own decisions they are more likely to honour the agreement reached.[47] The neutrality of the mediator is essential to protect the fidelity of the process as a conflict of interest or partisanship can bias the mediator against one of the parties.[48] Within mediation the parties are free to create their own unique solution to meet their interests that need not be based upon legal rules or precedent.[49]

### 3.2 Environmental Disputes and Environmental Mediation

Environmental disputes over concerns such as fresh water, urban expansion, climate change and land use are ongoing. Environmental disputes have unique characteristics influencing the mediation process, the role of the mediator, and the definition of a successful outcome. The benefits of environmental mediation are reflective of the benefits of traditional mediation, but some question whether mediation is indeed the best dispute resolution mechanism for the environment.

41 At 10.
42 At 10–13.
43 Law Commission *Delivering Justice for All* (NZLC R85, 2004) at 87.
44 Laura Horn "Mediation of Environmental Conflicts" (2005) 22 EPLJ 369 at 371.
45 *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2001] 3 NZLR 343 (CA) at [24]. See also *Re Campaigners Against Toxic Sprays* [2009] NZRMA 49 (EnvC); and N Khouri "Should you lay bare your soul? The shifting landscape of mediation privilege in New Zealand" (2016) 27 ADRJ 111.
46 R Charlton *Dispute Resolution Guidebook* (LBC Information Services, Sydney, 2000) at 14.
47 At 14.
48 Horn, above n 44, at 374.
49 Charlton, above n 46, at 5.

### *3.2.1 Environmental disputes*

Environmental disputes have four distinguishing characteristics from typical commercial or civil disputes. First, the subject matter of environmental disputes is often predictive. Second, they usually involve multiple parties. Third, they are normally multi-issue. Finally, they normally have strong elements of public law and public interest.

The predictive characteristic of the subject matter relates to future events, activities, plans and effects on the environment,[50] therefore those who exercise decision-making roles are required to take a precautionary approach.[51] This approach provides that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.[52]

Frequently multiple parties are involved,[53] who are often not readily identifiable at the outset,[54] and whose representatives may present in varying capacities.[55] Parties could be central and local government, environmental protection groups, Māori, non-governmental organisations, community groups, and individuals.[56] Differing parties may each claim to speak for the environment.[57] Similarly the public interest may be represented by more than one party, each claiming to speak for ill-defined or inchoate constituencies such as "the community", or "humanity", or "future generations".[58]

Environmental disputes are often multi-issue, requiring multi-disciplinary expert opinion.[59] The issues may involve scientific or technical matters of great complexity and uncertainty, potentially having consequences that are irreversible, cumulative or long-delayed.[60] The stakes and risks may therefore be

50 L Newhook "New Horizons in the Environment Court: Innovations in Dispute Resolution in Environmental Disputes" (paper presented to AMINZ Conference, Wellington, July 2015) at 2.

51 *Stark v Waikato District Council* [2014] NZEnvC 19 at [69].

52 B Preston "Limits of Environment Dispute Resolution Mechanisms" (1995) ABR 4 at [41].

53 R Lyster "Should We Mediate Environmental Conflict: A Justification for Negotiated Rulemaking" (1998) 20 Syd LR 579 at 580.

54 C Voigt "Environmental Mediation and the Resource Management Act 1991: Resolving Resource Management Problems or Compromising the Environment?" (2000) 9 AULR 912 at 940.

55 Newhook, above n 50, at 2.

56 At 2.

57 Lyster, above n 53, at 592, 593. See also Voigt, above n 54, at 942–945.

58 J Harrison "Environmental Mediation: The Ethical and Constitutional Dimension" (1997) 9 JEL 79 at 81. See also Lyster, above n 53, at 591; Voigt, above n 54, at 940–942; and Horn, above n 44, at 371, 372.

59 Newhook, above n 50, at 2. See also Lyster, above n 53, at 580.

60 J Roberts "Environmental Mediation: Dispute Resolution or Dispute Management?" (1993) 4 ADRJ 150 at 151. See also *Stark v Waikato District Council*, above n 51, at [69].

very high, and issues may involve contested fundamental values.[61] Compounding the complexity of the issues are the multiple relationships between the various parties with interacting points of influence.[62]

Finally, strong elements of public law and public interest run through environmental disputes as they normally centre on policies, plans, consents and enforcement. Therefore while the dispute may be private, issues of public interest may underpin the matters in dispute.[63]

### *3.2.2 Environmental mediation*

Environmental mediation is an adaptation of traditional mediation in response to the unique characteristics of environmental disputes.[64] The "principled negotiation" method used in traditional mediation adopts a four-part approach of separating people from the problem, focusing on interests not positions, inventing multiple mutually beneficial options, and basing the result on some objective standard.[65] The approach focuses on the interests the parties perceive as important to resolve the dispute, rather than the priority of long-term effects on the environment.[66] Traditional mediation of, for example, commercial disputes takes place out of the public eye, off the public record, and is often away from the jurisdiction of the courts.[67] However, such an approach is inappropriate where the subject matter of the dispute is the environment involving the public interest. Therefore, the unique characteristics of environmental disputes make the uniform application of traditional mediation, along with commercial concepts of success, unsuitable.[68]

(i) Definition
Environmental mediation can be defined as:[69]

61 Harrison, above n 58, at 81.
62 Voigt, above n 54, at 940.
63 Newhook, above n 50, at 2. See also Horn, above n 44, at 376.
64 Horn, above n 44, at 369.
65 R Fisher and W Ury *Getting to Yes: Negotiation and Agreement Without Giving In* (3rd ed, Random House, London, 2012) at 11.
66 Horn, above n 44, at 377.
67 K Casey "Good Faith in Environmental Alternative Dispute Resolution: When 'Any Road' Won't Do" (2007) 24 EPLJ 346 at 346.
68 At 347.
69 NC Borrie "An Evaluation of the Use of Mediation in Environmental Dispute Resolution Under s 268 of the Resource Management Act 1991" (MRS Thesis, Lincoln University, 2002) at 20, 21. Note: to make for easier reading the text has been slightly edited and references to academic sources removed.

> [T]he use of an impartial or independent third party who helps to convene and facilitate discussions and dialogue among parties in conflict over issues concerning the use, allocation, protection, or enhancement of natural resources. It involves bargaining, sharing information, and ultimately compromising on original positions so as to achieve a solution "acceptable" to all parties involved.

Of note is that the definition adds a convening function. Compromise on original positions is often required to achieve an acceptable solution. Underlying the definition is a collaborative problem-solving approach which may not yield an agreement but may be valuable for expanding the available information on potential impacts, exploring alternatives and mitigation measures, and improving the relationship between the parties.[70] Parties negotiate on the understanding that often matters at issue are future-oriented; therefore any "wins" or "losses" resulting from an agreement can impact on wider society and future generations and a dispute may not be resolved simply because a decision or settlement has been reached.[71] Successful outcomes may range between full resolution, partial resolution, and "scoping" the full range of expert opinion and scientific data such that issues that go to trial are sufficiently narrowed.[72]

(ii) The mediator's role

The role of the mediator in environmental mediation differs from that found in traditional mediation. In traditional mediation the parties reach consensus on who is to mediate, and how. The mediator is neutral and not involved with the content but facilitates a process for the parties to manage their own content, negotiate, and reach a mutually acceptable outcome.[73]

In environmental mediation the mediator is an impartial or independent third party. The Court may appoint the mediator unless the parties make other arrangements.[74] In some circumstances mediators may be appointed by local government to convene and facilitate mediation.[75] As a convener the mediator is responsible for identifying the parties and inviting them to the mediation. The mediator may be required to direct the parties' attention to wider matters

70 A Camacho "Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions" (2005) 24 Stan Envtl LJ 269 at 291.

71 L Boulle, J Jones and V Goldblatt *Mediation: Principles, Process, Practice* (NZ ed, Butterworths, Wellington, 1998) at 8.

72 Roberts, above n 60, at 153.

73 C Powell "Alternative Dispute Resolution: Australian National Mediation Standards" [2015] NZLJ 379 at 379.

74 Environment Court Practice Note 2014, cl 5.1(a) and (b) [EC Practice Note 2014].

75 P Adler "Resolving Public Policy Conflicts Through Mediation — The Water Code Roundtable" (1990) 1 ADRJ 69 at 74.

such as principles of environmental sustainability, environmental regulations, or other interests that have a bearing on the issues.[76]

Environmental mediators enable discussion and dialogue through well-honed facilitation skills, general knowledge of environmental issues, and understanding of the characteristics of environmental disputes. This resembles the "blended approach" to mediation which requires the mediator to have special knowledge and expertise in the subject area.[77] The mediator may need to remind the parties that the focus is not on reconciliation of values but on finding outcomes that ensure any activity has the least possible impact on the environment.[78] It may be that the mediator has to draw the parties' attention to the fact that there may be other ways than mediation to resolve the issues.[79] The skills and experience of the mediator can lead to surprisingly good results where it may have been predicted that mediation may not have been successful.[80]

(iii) Benefits

The benefits of environmental mediation are reflective of traditional mediation. The process is flexible allowing the participants wide discretion to decide such matters as mediator appointment, timing, location, site visits, number of meetings, and formalities.[81] Confidentiality means the parties can explore options without information being used or disclosed outside the mediation.[82] The process is voluntary, leading to willing participation and the likelihood of a successful outcome.[83] There can be savings in time and cost where disputes are resolved at the earliest possible stage. Relationships between parties can be preserved, restored, or enhanced, and ownership of the issues shared as the parties work out their differences and problem-solve together.[84]

The interests of the environment and law can be served through the creation of value in the process as was observed in two case studies, from Australia and the United States of America:[85]

76 Lyster, above n 53, at 591, 592.
77 Powell, above n 73.
78 Lyster, above n 53, at 589, 590.
79 Horn, above n 44, at 378.
80 V Rive "Resolving Conflicts by Consensus: Environmental Mediation under the Resource Management Act 1991" (1997) 1 NZJEL 201 at 214.
81 RM Dunlop "Alternative Dispute Resolution — Thinking Outside the Square" Resource Management Journal (April 2012) at 32.
82 At 32. See also C Kirman and J van den Bergen "Mediation Privilege: Implications of the *Campaigners Against Toxic Sprays* Decision" Resource Management Journal (August 2007) at 4.
83 Resource Management and Electricity Legislation Amendment Bill 2005 (237-2) (commentary) at 11.
84 Dunlop, above n 81, at 32.
85 S Moore and R Lee "Creating Value: A Hidden Benefit of Environmental Dispute Resolution in Australia and the United States" (1998) 9 ADRJ 11 at 18.

> Both planning processes took place in an environment with legislative requirements for public consultation, a land management agency willing to go beyond these requirements, and public lands of great interest to the community. Within this environment, several attributes of the planning process were conducive to creating value: settings where talking and listening were possible; sufficient time; and diverse participants. Key features of the negotiating environment which made talking and listening possible were facilitation of meetings, small group work, and field trips. All provided opportunities for members to exchange information, learn from and about one another, realise latent and develop new shared interests, and work constructively with differences. Talking and listening also allowed people to find out what was most important to themselves.

Mediation encourages the search for a variety of possible outcomes, thereby creating new solutions to existing problems.[86] There is scope for parties to agree to matters outside the Court's jurisdiction[87] and it is open for parties to agree to consent conditions which the Court could not properly determine.[88] Proposals for environmental compensation can be negotiated.[89] Mediation is resource efficient, typically being less expensive and quicker than a court hearing.[90]

(iv) Inherent limitations

The underlying philosophies of confidentiality, voluntariness, empowerment, neutrality and a unique solution create inherent limitations for the use of mediation in environmental disputes, particularly where the risk of damage to the environment is serious because there is no certainty that the environment will be protected.[91] Confidentiality results in a lack of transparency in the process leaving uncertainty over whether the public interest has been represented.[92] Irrespective of the parties' willingness to voluntarily enter mediation, some disputes should not be mediated because they involve non-negotiable ethical issues and the risk of damage to the environment is serious.[93] In some disputes the power imbalance between the parties could render the outcome unfair with one side having access to greater resources such as finances and scientific data.[94] The impartiality and neutrality requirements of

86 C Napier "The Resolution of Commercial Environmental Disputes Using Mediation" (2000) 11(2) ICCLR 49 at 49.
87 Dunlop, above n 81, at 32. See also EC Practice Note 2014, cl 5.1(c).
88 At 33.
89 At 33.
90 Newhook, above n 50, at 3.
91 Horn, above 44, at 371, 384.
92 At 371, 372.
93 At 373.
94 At 373, 374.

the mediator are a lot less than that of a judge or arbitrator. The neutrality of the mediator may be compromised where their values conflict with one side of the dispute, influencing the outcome.[95] Mediation and the finding of a unique solution could deprive the legal system of important precedent handed down by the Court and result in outcomes that disregard principles of environmental sustainability.[96]

## 4. MEDIATION AND ADR PROCESSES IN THE RMA

The RMA provides mediation as a dispute resolution mechanism within local government policy, planning and consenting processes in sch 1.8AA and s 99A. Section 268 gives the Court discretion to use the full suite of ADR mechanisms in its proceedings. For completeness but without further comment it is noted that s 356 allows for parties with appeal rights under the RMA to apply to the Court for an order authorising the matter to be determined by arbitration.[97] Clearly, the resolution of environmental disputes outside of formal local government or court processes is intended within the RMA.[98]

### 4.1 Schedule 1.8AA — Policy and Plan Process

Within the preparation, change and review of policy statements and plans by local government, the relevant sub-clauses in sch 1.8AA provide for disputes to be resolved through mediation:

> **8AA Resolution of disputes**
>
> (1) For the purpose of clarifying or facilitating the resolution of any matter relating to a proposed policy statement or plan, a local authority may, if requested or on its own initiative, invite anyone who has made a submission on the proposed policy statement or plan to meet with the local authority or such other person as the local authority thinks appropriate.
>
> …

95 At 374, 375.

96 At 375.

97 RMA, s 356. It is suggested that this is a vestigial provision carried over from the repealed Town and Country Planning Act 1977. The provision refers to the repealed Arbitration Act 1908, and arbitration is "little used" according to Environment Commissioner Dunlop in Dunlop, above n 81, at 32.

98 Voigt, above n 54, at 935.

(3) The local authority may, with the consent of the parties, refer to mediation the issues raised by persons who have made submissions on the proposed plan or policy statement.

(4) Mediation under subclause (3) must be conducted by an independent mediator.

…

### 4.2 Section 99A — Resource Consent Process

The local government resource consent application process has provision for mediation as a mechanism for dispute resolution in s 99A:

**99A Mediation**

(1) A consent authority may refer to mediation a person who has made an application for a resource consent and some or all of the persons who have made submissions on the application.

(2) The authority may exercise the power in subsection (1)—

(a) either—

(i) at the request of one of the persons; or

(ii) on its own initiative; and

(b) only with the consent of all the persons being referred; and

(c) only for the purpose of mediating between the persons on a matter or issue.

(3) Mediation under this section must be conducted by—

(a) a person to whom the authority delegates, under section 34A, the power to mediate; or

(b) a person whom the authority appoints to mediate, if the authority is the person who has made an application for a resource consent.

(4) The person who conducts the mediation must report the outcome of the mediation to the consent authority.

### 4.3 Section 268 — Court Proceedings

The Court, either of its own initiative or upon request, may direct the parties to an appropriate ADR process for the purpose of encouraging settlement:

**268 Alternative dispute resolution**

(1) At any time after lodgment of any proceedings, for the purpose of encouraging settlement, the Environment Court, with the consent of the parties and of its own motion or upon request, may ask one of its members or another person to conduct mediation, conciliation, or other procedures designed to facilitate the resolution of any matter before or at any time during the course of a hearing.

(2) A member of the Environment Court is not disqualified from resuming his or her role to decide a matter by reason of the mediation, conciliation, or other procedure under subsection (1) if—

(a) the parties agree that the member should resume his or her role and decide the matter; and

(b) The member concerned and the court are satisfied that it is appropriate for him or her to do so.

## 5. LOCAL GOVERNMENTS' USE OF MEDIATION

Local governments' use of mediation under sch 1.8AA and s 99A appears to be negligible as indicated by responses from the Auckland Council and eight of the 11 regional councils. In the past three years only two first-instance mediations were recorded amongst the councils, most commenting that they do not use the provisions.[99]

The responses are indicative of the lack of information in the public domain about the option to mediate at first instance. The Ministry for the Environment's

99 Auckland Council "FYI Request 4530-9e5ddd64" (20 September 2016) LGOIMA No 8140000472 (Obtained under Local Government Official Information Act 1987 Request to the Auckland Council); Greater Wellington Regional Council "FYI Request 4647-c609e7da" (3 October 2016) OIA-7-2155 (Obtained under Local Government Official Information Act 1987 Request to the Greater Wellington Regional Council); Taranaki Regional Council "FYI Request 4650-942cbdea" (4 October 2016) Document: 1753679 (Obtained under Local Government Official Information Act 1987 Request to the Taranaki Regional Council); Southland Regional Council "FYI Request 4650-1443ce62" (27 September 2016) Ref: A288640 (Obtained under Local Government Official Information Act 1987 Request to the Southland Regional Council); Bay of Plenty Regional Council "Official Information request — Use of mediation in planning and consent process" (29 September 2016) Ref: 2016-09/16-0063 (Obtained under Local Government Official Information Act 1987 Request to the Bay of Plenty Regional Council); Otago Regional Council "Official Information request — Use of mediation in planning and consent process" (29 September 2016) Letter from Peter Kelliher (Obtained under Local Government Official Information Act 1987 Request to the Otago Regional Council); Hawke's Bay Regional Council "Official Information request — Use of mediation in planning and consent process" (26 September 2016) Letter from Mark Heaney (Obtained under Local Government Official Information Act 1987 Request to the Hawke's Bay Regional Council); Northland Regional Council "Official Information request — Use of mediation in planning and consent process" (10 October 2016) Letter from Colin Dall (Obtained under Local Government Official Information Act 1987 Request to the Northland Regional Council); Environment Canterbury Regional Council "FYI Request 4639-623f7f16" (12 October 2016) File No: GOVE/INQU/OMBU/1030C (Obtained under Local Government Official Information Act 1987 Request to the Environment Canterbury Regional Council).

*An Everyday Guide to the RMA* makes no mention of the provisions.[100] A search of New Zealand's 11 regional councils' websites using the words "mediation", "hearing mediation", and "hearing procedures" yielded scant results for the use of mediation.[101] The Auckland Council website published hearing procedures that addressed mediation,[102] and provided a supplementary fact sheet on mediation,[103] but these were associated with the Local Government (Auckland Transitional Provisions) Act 2010 and not the RMA. The New Zealand Productivity Commission's *Better Urban Planning Draft Report* does not include mediation as a first-instance dispute resolution mechanism available in the urban planning process despite recognising the likely challenges of climate change, the complexity of sustainability and the need to employ adaptive management techniques.[104]

Reasons why mediation is not used by local government are unclear. It may be that mediation is an unfamiliar process outside the well-trodden path of pre-hearing and hearing meetings, and appeals to the Court. Legal counsel and local government employees may not be alert to the option or have sufficient training. Power imbalances between parties may be too great, meaning the dispute is not amenable to mediation. As decision-maker, local government normally holds most power in a dispute. Rather than referring a dispute to first-instance mediation which may slow the decision-making process down, the local government decision-makers may gamble that few disputants will actually appeal their decisions. Cost such as paying for the mediator and legal representatives may also deter the parties.

Despite the lack of sch 1.8AA and s 99A mediation examples there are working models of local government making use of ADR mechanisms in planning and RMA disputes. Two examples are the Auckland Unitary Plan Independent Hearings Panel's use of expert conferences and mediation,[105] and Environment Canterbury's Alternative Environmental Justice Scheme.[106]

100 Ministry for the Environment *An Everyday Guide to the RMA* (2014) <www.mfe.govt.nz/publications/rma/everyday-guide-rma>.

101 The author conducted this search on 13 September 2016.

102 Auckland Unitary Plan Independent Hearings Panel *Auckland Unitary Plan Procedures* (version 1.4, 24 November 2015) <http://www.aupihp.govt.nz/documents/docs/aupihphearingprocedures.pdf> at 9.

103 Auckland Unitary Plan Independent Hearings Panel *Factsheet 4 — Mediation* (10 August 2015) <http://www.aupihp.govt.nz/documents/docs/aupihpfs4mediation.pdf> [Hearings Panel].

104 New Zealand Productivity Commission *Better Urban Planning Draft Report* (August 2016) <www.productivity.govt.nz/inquiry-content/urban-planning> at ch 8.

105 Local Government (Auckland Transitional Provisions) Act 2010, ss 133, 134.

106 Environment Canterbury *Guidelines for implementing Alternative Environmental Justice* (R12/81, August 2012) <http://www.crc.govt.nz/publications/Reports/guidelines-aej.pdf>.

The Auckland Unitary Plan Independent Hearings Panel, in its fact sheet on mediation, listed mediation as important to the Unitary Plan process as a means to clarify or work through issues in more collaborative and less formal ways than is possible in a hearing.[107] Mediation, often involving multiple parties, was used successfully, enabling parties to voice concerns, expose and narrow issues, and open communication lines.[108]

Environment Canterbury's Alternative Environmental Justice Scheme is a pragmatic response to environmental offences under the RMA where an infringement fine does not provide an adequate deterrent, but a prosecution may be overly harsh.[109] The underlying ideology is that the use of restorative justice principles for environmental offences enhances public participation in environmental disputes and improves environmental outcomes.[110] One example is *Canterbury Regional Council v Interflow (NZ) Ltd* where the defendant (Interflow), guilty of unlawful discharge into a stream causing pollution, engaged in a restorative justice conference with affected parties.[111] The agreed outcome, which was beyond what the Court could impose through a fine, benefited the environment and community, and enhanced Interflow's reputation.[112]

## 6. THE ENVIRONMENT COURT'S USE OF ADR PROCESSES

The Environment Court has long recognised the value of ADR processes,[113] taking a pragmatic approach to ADR through a combination of active case management and promotion of mediation.[114] Presently ADR processes resolve approximately 75 per cent of the Court's caseload.[115]

107 Hearings Panel, above n 103, at 1.

108 Observations from a conversation with Alan Watson, AUPIHP member and independent hearing commissioner (30 September 2016).

109 Environment Canterbury, above n 106.

110 C Wilson "Proactive Restorative Justice: A Set of Principles for Enhancing Public Participation" (2016) 33 EPLJ 252.

111 *Canterbury Regional Council v Interflow (NZ) Ltd* [2015] NZDC 3323.

112 V Sugrue "What happens when values are put to work? A reflection in one outcome from a Restorative Justice Conference in the criminal division of the District Court: Environment warranted judge jurisdiction" Resource Management Journal (November 2015) at 19.

113 K Palmer "Reflections on the History and Role of the Environment Court in New Zealand" (2010) 27 EPLJ 1 at 7.

114 At 11.

115 Newhook, above n 50, at 1.

Mediation was actively promoted by the Court's predecessor, the Planning Tribunal,[116] evident in *Rural Management Ltd v Banks Peninsula DC* where Judge Treadwell remarked: "If any case ever called for mediation it was this case."[117] In *TV3 Network Services Ltd v Waikato District Council*, an appeal from the Environment Court, Justice Hammond observed: "Indeed, the situation arising strikes me, with respect, as a classic case for an environmental mediation, prior to a further RMA application."[118] TV3 had sought resource consent to build a transmission tower on a hill of spiritual significance to Tainui, the local Māori tribe, called Horea. Tainui had opposed the consent application, but the Council issued consent. Tainui appealed to the Court which reversed the decision reasoning that the translator would offend Māori heritage and the "waahi tapu" or "sacredness" of Horea. TV3 appealed to the High Court. The High Court upheld the Court's decision. Hammond J observed that the 1996 amendments to the RMA allowed TV3 to reapply for resource consent for its transmission tower as a controlled activity. He went on to say: "[I]t would be unfortunate if some greater cooperation were not forthcoming in an endeavour to avoid the distinct clash of values which faced the Court."[119]

In 2014 the Court updated its Practice Note[120] to reflect the developing use of ADR processes in its jurisdiction.[121] Clause 5 is a significant section on ADR, and Appendix 2 articulates the protocol for court-assisted mediation. Clause 7 is a section on expert witnesses, and Appendix 3 describes the protocol for expert witness conferences. Importantly, expert witnesses are not "hired guns" advocating for the party who called them but have a duty to the Court to provide opinion with impartiality.[122] The cost of a court-appointed mediator is borne by the Court with the parties covering their own costs. Should the parties choose an independent mediator, then they are required to cover those costs. Court-arranged mediation is to last no more than three days.[123]

The Ministry for the Environment (MfE) has also published an information booklet titled *You, Mediation and the Environment Court* explaining court-arranged mediation at the appeals stage.[124] The nett effect is that disputants involved in ADR processes arranged by the Court have access to information,

116 *Resource Management: Resource Management Act* (online looseleaf ed, Westlaw) at [A268.01].

117 *Rural Management Ltd v Banks Peninsula DC* [1994] NZRMA 412 (PT) at 426.

118 *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360 (HC) at 374.

119 At 374.

120 EC Practice Note 2014.

121 Newhook, above n 50, at 4.

122 EC Practice Note 2014, cl 7.2 and Appendix 3.

123 Appendix 2, cl 3(c).

124 Ministry for the Environment *You, Mediation and the Environment Court* (3rd ed, ME 1191, March 2015) <www.mfe.govt.nz/publications/rma/everyday-guide-rma-you-mediation-and-environment-court>.

clear protocols, mediators and facilitators trained in environmental dispute resolution, and a process with judicial oversight.

The pragmatic approach of the Court is summed up by the Principal Environment Judge, Principal Judge Newhook:[125]

> The approaches that members of the Court have been developing in recent years now go well beyond voluntarily-approached mediation, followed by traditional hearings where the case has not settled. Commissioners and Judges now regularly employ their environmental law skills, experience and ADR training, to offer processes that, while they may not be expressly described as such while running, strongly resemble collaboration, joint fact-finding, expert conferencing, third party assessment, interest-based negotiation, expert determination, conciliation, and judicial settlement conferences. The last named is the province of the Judges, who have also been instrumental in undertaking, during the course of hearings, what the Australians call "hot-tubbing" of groups of expert witnesses. The Judges also employ case management techniques during the life of each case that encourage parties to find and own solutions, a kind of instinctive and constant ADR approach.

## 7. WHO IS RESPONSIBLE FOR THE EFFICACY OF THE ADR OUTCOME?

The Environment Court's extensive use of ADR processes may suggest that it is responsible for the efficacy under the RMA of the outcome. The Court's displeasure has been evident in two recent cases where the Court has felt compelled to question the negotiated outcome and make intervention. The first case resulted in the High Court overturning a ruling by the Court to keep a consent appeal alive after the parties had negotiated an agreement to withdraw the appeal. In the second case the parties' counsel, having failed to consult environmental experts, negotiated an agreement that inadequately addressed the initial dispute. The High Court ruling, recognising the administrative function of local government under the RMA, confers the responsibility for achieving the purposes of the RMA squarely with local government unless the parties in dispute seek an outcome from the Court.[126] Outcomes are reviewed by the Court where they fall within the Court's jurisdiction but side agreements from ADR processes are of concern, falling outside the jurisdiction of the Court.

125 Newhook, above n 50, at 4.

126 *Hurunui Water Project Ltd v Canterbury Regional Council* [2016] NZRMA 71 (HC) at [111] [*Hurunui*].

### 7.1 *Amuri Irrigation Company Ltd v Canterbury Regional Council* [2015] NZEnvC 164 (*Amuri*); *Hurunui Water Project Ltd v Canterbury Regional Council* [2015] NZHC 3098 (*Hurunui*)

In October 2011 Hurunui Water Project Ltd (HWPL) applied to the Canterbury Regional Council (CRC) for consents to take water for irrigation from the Hurunui catchment. In August 2013 the appointed commissioners reported their decision granting various resource consents. Amuri Irrigation Company Ltd (AICL) appealed the whole decision. Early on in the proceedings the parties entered into court-assisted mediation followed by protracted negotiations spanning 18 months. In February 2015 the parties reached agreement and a consent memorandum was lodged with the Court Registrar. The Court expressed concern regarding parts of the consent memorandum and between March and August 2015 the parties were in dialogue with the Court. During this time AICL and HWPL negotiated a side agreement whereby AICL agreed to withdraw its appeal. On 7 August 2015 the parties issued a joint memorandum withdrawing the appeal and for the original consent decision of August 2013 to remain. The Court chose not to close the file.

Among the Court's rulings in *Amuri* it was held that there had been an abuse of process as the purpose of the RMA requires a better set of conditions to be imposed than the consent decision appealed from.[127] Environment Judge Jackson expressed a level of suspicion regarding the side agreement, remarking that the substance was "curious", conferring no apparent benefit to AICL, and was a time-saving measure to avoid the Court asking awkward questions.[128]

HWPL appealed to the High Court, the *Hurunui* ruling. The High Court set aside the Environment Court's determinations. Judge Mander remarked that the public interest role of the Environment Court does not warrant its interference with the right of an appellant to withdraw its appeal.[129] Mander J concluded that the Court was in error to hold that the consent memorandum must "better" achieve the purposes of the RMA than the first-instance decision. He reasoned that such an approach could undermine parties being able to reach settlement agreements inter partes, as the RMA seeks to encourage.[130] Importantly, Mander J observed that the consent authority is at the centre of any ADR process with responsibility for ensuring the efficacy of the conditions of any renegotiated consent,[131] and that compliance with the RMA is achieved.[132]

127 *Amuri Irrigation Company Ltd v Canterbury Regional Council* [2016] NZRMA 1 (EnvC) at [141] [*Amuri*].
128 At [135].
129 *Hurunui*, above n 126, at [110].
130 At [60].
131 At [55].
132 At [59].

### 7.2 *Classic Properties Ltd v Canterbury Regional Council* [2016] NZEnvC 20

Classic Properties appealed the Canterbury Regional Council (CRC) decision to decline their application for a water permit. The outcome, consent memorandum documentation, from subsequent negotiations between the parties was submitted to the Court. The Court observed in pre-hearing meetings that the consent memorandum did not set out and address the original reasons for declining consent given by the CRC. The Court discovered the consent memorandum represented the culmination of counsels' negotiations. Counsel had failed to engage independent expert advice. The Court directed expert evidence be submitted by the parties in the form of affidavits, which was duly done. The appeal was allowed and consent granted.

However, Judge Borthwick was none too pleased, expressing concern that counsel had given assurance without the benefit of advice from relevant experts.[133] Judge Borthwick stated in no uncertain terms that where the proposal has been modified through the ADR process after the appeal is lodged, the information provided to the Court in a consent memorandum ought to enable the Court to understand the whole of the proposal. Furthermore, the information provided must enable the Court to understand how the conditions address the reasons for declining the consent, satisfy itself that it has jurisdiction to make the orders, and, critically, satisfy itself that the making of the orders will promote the purpose of the RMA.[134] Judge Borthwick's remarks strongly reflect Mander J's observation in *Hurunui*: "The consent authority remains central to that process of resolution, and continues to have responsibility for the efficacy of the conditions of any renegotiated consent."[135]

### 7.3 Side Agreements

Judge Jackson, in *Amuri*, expressed concern about the side agreement between AICL and HWPL.[136] Side agreements are said to be an advantage of court-arranged mediation, enabling the parties to reach agreements outside the jurisdiction of the Court.[137] However, there is concern that side agreements eventuating out of confidential ADR processes in environmental disputes lack transparency.[138] There is unease over the balance to be found between private

133 *Classic Properties Ltd v Canterbury Regional Council* [2016] NZEnvC 20 at [8].
134 At [18].
135 *Hurunui*, above n 126, at [55].
136 *Amuri*, above n 127, at [135].
137 Dunlop, above n 81, at 32.
138 K Palmer "Assessment and Approval of Consent Orders" (paper presented to Environment Court Conference, Wellington, April 2016) at 14, 15.

negotiation, ethical standards, integrity of the RMA, and possible misuse of process. Side agreements have the potential to undermine public confidence if they include undisclosed payments. It has been suggested that in all resource consent applications, there should be a statutory obligation on the applicant to declare whether any side agreements or compensation payments have been made in order to obtain approvals in circumstances which could be contrary to the fair procedures and objectives of the RMA.[139]

## 8. RESOURCE LEGISLATION AMENDMENT BILL 2015

The Resource Legislation Amendment Bill was introduced to Parliament on 26 November 2015, had its first reading on 3 December 2015, and was referred to the Local Government and Environment Select Committee for consideration, where it is at present.[140] The overarching purpose of the Bill is to create a resource management system that achieves the sustainable management of natural and physical resources in an efficient and equitable way.[141] One objective is to shift public engagement from individual consent decisions to upfront planning decisions.[142] A particular emphasis in the Bill is on procedural principles, and among the proposals are important changes to the Environment Court's use of ADR processes. In part the proposed changes reflect the Court's existing pragmatic approach. Significantly the Bill proposes mandatory participation in court-arranged ADR processes, representing a "sea change" from voluntary participation. The Bill seeks to encourage stakeholder engagement to first-instance decisions by expressly stating that the Court is to regard the outcome of any ADR process. However, the existing provisions for local government first-instance mediation are untouched by the Bill.

### 8.1 New s 18A — Procedural Principles

The emphasis in the Bill is on processes that are proportional and adaptable so that resource management decisions are robust and durable. To that end the Bill proposes a new s 18A regarding procedural principles.[143] Notable is subs (a):

139 At 15.

140 Ministry for the Environment "About the Resource Legislation Amendment Bill 2015" (8 December 2015) <http://www.mfe.govt.nz/rma/rma-reforms-and-amendments/about-resource-legislation-amendment-bill-2015>.

141 Resource Legislation Amendment Bill 2015 (101-1) (explanatory note) at 1.

142 At 2.

143 Clause 8.

> **18A Procedural principles**
> Every person exercising powers and performing functions under this Act must—
> (a) use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions or powers being performed or exercised; …

The benefits of mediation such as flexibility and savings in cost and time as discussed above suggest that mediation is a process fitting within subs (a).

## 8.2 Important Changes to the Court's Use of ADR

Within the Bill proposals there are important changes to the Court's use of ADR mechanisms, found in proposed new ss 268, 268A and 290. The intention is to enhance the Court's ability to address appeals in a proportionate, timely and cost-effective manner.[144]

### *8.2.1 New s 268*

The proposed new s 268 replaces existing s 268 and reads:[145]

> **268 Alternative dispute resolution**
> (1) At any time after proceedings are lodged, the Environment Court may, for the purpose of facilitating the resolution of any matter, ask a member of the Environment Court or another person to conduct an ADR process before or at any time during the course of a hearing.
> (2) The Environment Court may act under this section on its own motion or on request.
> (3) A member of the Environment Court who conducts an ADR process is not disqualified from resuming his or her role to decide a matter if—
> (a) the parties agree that the member should resume his or her role and decide the matter; and
> (b) the member concerned and the court are satisfied that it is appropriate for him or her to do so.
> (4) In this section and **section 268A**, **ADR process** means an alternative dispute resolution process (for example, mediation) designed to facilitate the resolution of a matter.

144 Ministry for the Environment *Regulatory Impact Statement — Resource Legislation Amendment Bill 2015* (6 November 2015) at [380].

145 Resource Legislation Amendment Bill, cl 91 [amended on second reading].

Aside from tidying the existing s 268 there is a change to the express purpose of any court-arranged ADR process from "encouraging settlement" to "facilitating the resolution of any matter", reflecting the existing pragmatic approach of the Court. The Court can direct the parties to mediation to "scope" out the issues and isolate them for judicial determination if necessary.[146] Such a use reduces hearing time spent trying to isolate issues thereby saving time and money. Court-directed mediation can also be a means of establishing communication between parties, and may even result in full resolution of the matters within the mediation.

*8.2.2 New s 268A*

The proposed new s 268A enables the Court to mandate participation in any court-arranged ADR process, representing a "sea change" from voluntary to mandatory participation in any court-arranged ADR process.[147] The proposed new s 268A reads:

> **268A Mandatory participation in alternative dispute resolution processes**
> (1) This section applies to an ADR process conducted under **section 268**.
> (2) Each party to the proceedings must participate in the ADR process in person or by a representative, unless leave is granted under this section.
> (3) Each person required to participate in an ADR process must—
> (a) be present in person; or
> (b) have at least 1 representative present who has the authority to make decisions on behalf of the person represented on any matters that may reasonably be expected to arise in the ARD process.
> (4) A party to the proceedings may apply to the Environment Court for leave not to participate in the ADR process.
> (5) The Environment Court may grant leave if it considers that it is not appropriate for the party to participate in the ADR process.

There is strong debate whether mandatory participation in an ADR process has an overall positive effect.[148] The arguments are finely balanced and a full discussion is beyond the scope of this article. Those in favour of mandatory participation take a pragmatic approach, offsetting any perceived losses to voluntariness against potential gains in efficiencies.[149] Those against mandatory

146 Roberts, above n 60, at 156, 157.
147 Resource Legislation Amendment Bill, cl 91 [amended at 14 March 2017].
148 Law Commission, above n 43, at 93.
149 For a full discussion on the benefits of mandatory mediation see Ministry for the Environment, above n 144, at [375]; Law Commission, above n 43, at 94; Australian Government Productivity Commission 2014 *Access to Justice Arrangements* (Inquiry

participation express concern that fundamentally the rule of law is threatened through the erosion of concepts such as voluntariness and participant control.[150]

*8.2.3 New s 290A*

The Bill proposed that s 290A be replaced by a new s 290A[151] expressly stating that in appeals under s 120 the Court must have regard to the outcome of any related alternative dispute resolution process.[152] The proposed new s 290A reads:

> **290A Environment Court to have regard to decision that is subject of appeal or inquiry, and to related reports and processes**
>
> In determining an appeal or inquiry, the Environment Court must have regard to—
>
> (a) the decision that is the subject of the appeal or inquiry; and
>
> (b) in the case of an appeal under section 120,—
>
> (i) any reports prepared by the consent authority for the purpose of a hearing on the decision; and
>
> (ii) the outcome of any related pre-hearing meeting or alternative dispute resolution process.

A full discussion is outside the scope of this article but the proposed new subs (b)(ii) warrants comment because it requires the Court to have regard to the outcome of any related ADR processes.[153]

Report No 72, Canberra) at ch 8.1; Rive, above n 80, at 222; K Mahoney "Mandatory Mediation: A Positive Development in Most Cases" (2014) 25 ADRJ 120 at 121–125; L Olsson "Mediation and the Courts — Inspiration or Desperation?" (1996) 5 JJA 236 at 241; M Redfern "Mediation is Good Business Practice" (2010) 21 ADRJ 53 at 54; Voigt, above n 54, at 921; M McIntosh "A Step Forward — Mandatory Mediation" (2003) 14 ADRJ 280 at 287; Casey, above n 67, at 353.

150 For a full discussion on the shortcomings of mandatory mediation see Mahoney, above n 149, at 122–124; McIntosh, above n 149, at 286–288; Hon Justice Helen Winkelmann "ADR and the Civil Justice System" (paper presented to the AMINZ Conference, August 2011) at 4, 14 and 20; C Green "ADR: Where Did the 'Alternative' Go? Why Mediation Should Not be a Mandatory Step in the Litigation Process" (2010) 12 ADR Bulletin 53 at 55; Rive, above n 80, at 223; Resource Management and Electricity Legislation Amendment Bill 2005 (237-2) (commentary) at 11; C Powell "Alternative Dispute Resolution: Good Faith in Mediation" [2015] NZLJ 377 at 378; R Ingleby "Court Sponsored Mediation: The Case Against Mandatory Participation (1993) 56(3) MLR 441 at 449; Horn, above n 44, at 384.

151 Resource Legislation Amendment Bill, cl 97. [Later deleted by the Select Committee.]

152 RMA, s 120 provides the right to appeal to the Court against a consent decision of a consent authority.

153 A relevant discussion around the issues is by T Daya-Winterbottom "RMA Déjà Vu: Reviewing the Resource Management Act 1991" (2004) 8 NZJEL 209 at 233–237.

The proposed new s 290A appears to be grounded in MfE policy to encourage full engagement by all stakeholders in first-instance decision-making by giving greater weight to the decision and related reports and processes:[154]

> The existence of de novo appeal rights and the ability of the Environment Court to replace decisions of council do not encourage full engagement of stakeholders in the first-instance decision, and have led to greater conflict in decision-making and a greater role for appeals. There are considerable time delays and costs during the appeals processes. Furthermore, the Environment Court processes take a legalistic approach, with no requirement to consider alternatives, benefits and costs, or the full range of local values. The lack of recognition of the full range of interests and values in plans has added costs to the resource consent stage, where issues are re-litigated consent-by-consent. This creates significant investment uncertainty and compliance costs.

This suggests that the intended effect of the proposed new s 290A is to shift the type of appeal or inquiry the Court can conduct away from an investigation de novo and to fetter the appeal board by what has gone before, thereby encouraging the parties to make better use of earlier opportunities. The elucidation of s 290A is unnecessary, given the Court's practice as observed by Judge Smith:[155]

> It is clear that the Act is intended to provide an expeditious process from the decisions of local authorities. Where the parties accept that many aspects of the appeal are not in dispute, it would seem counter-productive that the Court must undertake an exhaustive examination of matters where the parties are agreed on the outcome.

Should the proposal be enacted and the Court is "to have regard" to any outcome from ADR processes, the Court has already held that "to have regard" does not create a presumption that the decision is correct, nor does it impose an onus on an appellant to demonstrate that it is wrong.[156] The threshold is that the decision conforms to the purposes and principles of the RMA and must be within the jurisdiction of the Court.[157] The proposed new s 290A does not change this threshold requirement, therefore any change in Court practice appears unlikely and the proposal produces no tangible encouragement for full engagement by all stakeholders in first-instance decision-making. Indeed, the

154 Ministry for the Environment, above n 144, at [181].

155 *Transwaste Canterbury Ltd v Canterbury Regional Authority* EnvC Christchurch C29/2004, 19 March 2004 at [48].

156 *Scion v Bay of Plenty Regional Council* [2013] NZEnvC 298 at [30].

157 *Hurunui*, above n 126, at [54].

proposed new section may cause greater cost and delays, by providing firmer ground for appeal where it is alleged the Court has failed to regard the decision, and related reports or processes. [Proposed s 290A since deleted.]

### 8.3 The Resource Legislation Amendment Bill and ADR Processes — Summary

One objective of the Resource Legislation Amendment Bill is for public engagement to shift to upfront planning decisions.[158] ADR processes support the Bill's objectives by providing a proportional, flexible and adaptable approach to dispute resolution. Furthermore, ADR processes seek outcomes that are mutually acceptable, robust and durable.

The Bill proposes to strengthen the Environment Court's existing use of ADR processes, particularly through empowering the Court to order mandatory participation. However, the proposals do not add incentives to encourage full engagement of stakeholders in the local government's decision and to resolve disputes through mediation in that forum. The under-utilised provisions in the RMA for local government mediation remain untouched. Perhaps it is appropriate at this juncture to ask again: If the Court is directing the majority of policy, plan or consent disputes to mediation, why was mediation not initiated at first instance by local government?

## 9. COMPARABLE JURISDICTIONS' EXAMPLES

Comparable jurisdictions provide helpful examples of legislation and case studies supporting ADR processes used in environmental disputes by local government and courts. The United States of America and Australia have the longest history of using environmental ADR processes while the English experience is more recent.

### 9.1 Legislative Support for ADR Processes

In the United States of America, federal legislative support for the use of ADR processes in environmental disputes by government agencies is found in the Code of Federal Regulations[159] and the Administrative Dispute Resolution Act of 1996 (ADRA).[160] The ADRA describes ADR processes, when they

158 Resource Legislation Amendment Bill 2015 (101-1) (explanatory note) at 2. [The Bill received its second reading on 14 March 2017.]

159 40 CFR § 22.18.

160 Administrative Dispute Resolution Act of 1996 Pub L No 104-320.

are appropriate, the third party neutral, and the meaning of confidentiality. Importantly the ADRA deems ADR processes to be supplementary to other dispute resolution techniques and may be used if the parties agree.

In Australia legislative support for ADR processes is most developed in New South Wales,[161] where the Civil Procedure Act 2005 No 28 (NSW) provides for court-mandated mediation.[162] Direction is given regarding definitions, court referral, duty to participate, costs, agreements and arrangements arising, privilege, confidentiality, and matters for the mediator.[163] Supplementary legislative sources are the Land and Environment Court Act 1979 (NSW) and the Land and Environment Court Rules 1996 (NSW).

## 9.2 Case Studies

Three case studies, one from the United States of America and two from England, illustrate the strengths and weaknesses of mediation in environmental disputes. The first example, the Hawaii Water Code Roundtable, illustrates the policy-making use of mediation when applied to a long-running policy dispute. In the second example, the Chichester flood mitigation dispute, mediation proves to be an efficient mechanism to solve a localised environmental dispute. The third example, the Peak District Access Consultative Group, is illustrative of a mediation process that was inadequately executed and poorly supported.

### *9.2.1 Hawaii Water Code Roundtable*

The Hawaii Water Code Roundtable (HWCR) is an example from the United States of America of mediation being used to find resolution to a multi-party, multi-issue, deeply entrenched political dispute with fundamental value conflicts.[164] At the heart of the dispute was the issue of ownership of water and the ability to treat it as property.

Ancient Hawaiians believed the water belonged to all people, but with Western contact and the rise of plantation agricultural systems water use and water rights conflicts emerged. Conflicts continued to escalate with growing industrial demands, instances of pollution, periods of drought, and overconsumption. In 1978 significant changes were made to the governance of water management with the state legislature taking responsibility. Over the next eight years various state water codes were introduced to the legislature and heatedly debated. The debates pitted developers against environmentalists, large

161 Horn, above 44, at 381, 382. Horn provides a useful summary of the legislative support for ADR processes within the jurisdiction of the NSW Land and Environment Court.

162 Civil Procedure Act 2005 No 28 (NSW), s 26(1).

163 Part 4.

164 Adler, above n 75.

landowners against Hawaiians' rights groups and small farmers, and various counties against the state. Stalemate became the inevitable result.

In mid-1986, local governmental bodies requested help from the Hawaiian judiciary to organise, convene and mediate an informal and voluntary policy dialogue centred on some of the issues involved in the water code stalemate. The judiciary agreed and a team of mediators was assembled to develop a general mediation strategy.

The first step was to identify actual and potential stakeholders in the conflict, and then convert the large numbers of stakeholders into meaningful negotiation teams. The next step was to distribute a draft concept paper to all potential participants outlining procedural matters, suggesting the creation of a neutral, ad hoc forum to enable discussion and joint problem-solving, and explaining the idea of the "Water Code Roundtable". The effect was to create a safe place for discussion between people who normally held entrenched opposing positions.

The initial meeting in July 1986 produced an agreement to proceed with mediated discussions. Decision-making, it was agreed, would be by consensus, and the process would only continue as long as people agreed to meet. More potential participants were identified and ground rules for participation adopted. One proviso allowed members to speak in their personal capacity rather than as official representatives of their constituencies. In effect this agreement allowed members to enter "no-risk" and more position-free discussions.

The next phase was a move from procedure to substance in the meetings. By January 1987 the Roundtable was able to draw up an agreement-in-principle that covered many of the water code issues. By consensus this was forwarded to key committee chairs and other public and private groups for consideration. Between January and April 1987 the proposals were discussed in various public hearings. Further compromises and modifications were made.

On 30 May 1987 Hawaii's new water code, which embraced many of the Roundtable's key consensus proposals, was passed into law. It is of note that a deliberate and determined environmental mediation process run by a team of expert mediators over a 20-month period brought to fruitful resolution an eight-year stalemate. The mediated outcome helped develop the law by giving the legislative branch of government recommendations supported by all stakeholders that could be enacted into law.

### *9.2.2 The Chichester flood mitigation dispute*

The Chichester flood mitigation dispute arose early in the planning stage between local residents and environmental groups over proposed flood mitigation measures for the Chichester area.[165] Environmental groups expressed

165 D Shanmuganathan "Two birds, one stone: a solution for planning and environmental disputes?" (2006) JPL 3 at 6, 7.

concern that the measures would damage feeding, roosting and nesting habitats for birdlife. Residents were concerned that if nothing was done their properties would be prone to flooding, sewerage overflows, and insurance premium increases. A mediator was engaged, the parties clearly identified, and pre-mediation meetings held. All parties were brought together for one day of mediated discussion at the end of which solutions were found for all the issues and a memorandum of understanding signed. The mediation saved considerable time and money for all parties, and no lawsuit followed.

### *9.2.3 Peak District Access Consultative Group*

The Peak District Access Consultative Group example involved Peak District National Park access rights.[166] Access rights are administered by a board. Access rights disputes between landowners, conservation groups, and recreational users have a long history dating back to the 1930s.

In the early 1990s many access agreements were due to expire and needed to be renegotiated. Part of the renegotiation strategy was the formation of the Peak District Access Consultative Group (PDACG) consisting of nine members (three representatives of each interest group) and a neutral mediator. Board members could also attend meetings. Each representative, it was assumed, would relate to a wider network within their sector of interest. Between September 1993 and June 1994 the PDACG met six times to present their respective interests and to build consensus on access management planning for the park. A report was prepared and submitted to the board in November 1994.

Reflections by the members upon the experience were mixed. Most felt they had gained a better understanding of the other points of view. A workable document had been produced and consensus-building had succeeded where conventional committee-working may have failed. However, there were reservations about whether fundamental conflicts had been addressed, whether trust between the parties had been established, and whether the report was sufficiently detailed. The process had taken a long time and evening meetings had frequently overrun. Voluntary officers representing democratic organisations felt constrained in what they could say during meetings, and some discussions had become overly abstract. The requirement for confidentiality had made reporting back to represented organisations difficult. Significantly, the board had made no prior commitment to act on the PDACG's recommendations and in the final event the board did not act on any of the report's recommendations. The effect was scepticism, particularly among recreational user groups, of the value of voluntary negotiations.

166 R Sidaway *Resolving Environmental Disputes: From Conflict to Consensus* (Earthscan, London, 2005) at 90–95.

The example illustrates a poorly supported and inadequate mediation process. The long history of the dispute suggests that a carefully considered process was required akin to the Hawaii Water Code Roundtable example. The various stakeholder groups had designated representatives, limiting their voice at the table, but board members had open access to meetings. It was assumed that the PDACG members would represent each of their constituent interest groups but there was no mechanism to ensure they actually did. The board did not specify the criteria by which it would evaluate recommendations and made no commitment to act on suitable recommendations. The example serves as a warning that mediation is not a panacea and careful consideration should be given to the mediation process itself.

## 10. INSTANCES FOR LOCAL GOVERNMENT MEDIATION

Two recent cases in the Environment Court are instances where local government mediation could have been used to find mutually beneficial outcomes without the expense in time and cost of court hearings. The first case, *Ngāti Mākino Heritage Trust v Bay of Plenty Regional Council*, concerning the Bay of Plenty Regional Council's RPS, presents as an opportunity for mediation under sch 1.8AA. The second case, *Gilderdale v Auckland Council*, sits under s 99A.

### 10.1 *Ngāti Mākino Heritage Trust v Bay of Plenty Regional Council* [2014] NZEnvC 25

This case concerned an appeal by Ngāti Mākino Heritage Trust (Ngāti Mākino) regarding the Bay of Plenty RPS. Ngāti Mākino sought more precise articulation within the RPS of the recognition of Māori values and Māori participation in direction-setting for the management of fresh water. There were four additional interested parties to the appeal exercising their right to be represented:[167] Trustpower, Fonterra, Federated Farmers, and Waitaha Iwi Resource Management Unit.

Judge Smith commented that at the outset Ngāti Mākino's concerns were fairly unclear but through the course of the hearing they became articulated.[168] He understood the concerns to be, first, Ngāti Mākino's customary and traditional values associated with the Waitahanui Stream had been overlooked. Second, the in-stream flow calculation for the Waitahanui did not give recognition to Māori cultural values. And last, Ngāti Mākino sought co-management and co-governance in the region.

167 RMA, s 274.

168 *Ngāti Mākino Heritage Trust v Bay of Plenty Regional Council* [2014] NZEnvC 25 at [9].

Ngāti Mākino sought a right or authority with regard to allocation of water that recognises and reflects the potential customary usages of tangata whenua.[169] Federated Farmers expressed concern that such recognition and provision for Ngāti Mākino and potentially other iwi[170] throughout New Zealand in regional plans would give preferential access to water for cultural uses based upon the status of the applicant.[171] Fonterra and Trustpower expressed similar concerns. Judge Smith observed that obtaining a clear definition from Ngāti Mākino for "cultural uses" proved elusive.[172] Ngāti Mākino expressed concern over how future generations would be provided for in water allocations.[173]

Ngāti Mākino took exception that the Waitahanui minimum flow level was determined not by consultation with them, but by the default requirements for trout, an introduced species of fish.[174] It was acknowledged this was insulting to Māori at all levels.[175] Concern was also expressed about the derogation of water quality due to changes in farming practices, particularly dairying.[176]

### *10.1.1 An opportunity for sch 1.8AA mediation*

The *Ngāti Mākino* fact scenario presents as an opportunity for sch 1.8AA mediation because it is a dispute over the content of the RPS. The characteristics of the dispute are comparable to the HWCR example though smaller in scale. There are fundamental value conflicts between Māori cultural values and Western economic and ownership values. There are multiple parties of varying size and economic influence. The conflict has historical roots and is politically contentious. The concerns and issues require clarification. There are matters beyond the Court's jurisdiction to determine — for example, concepts of co-management and co-governance which to work will require ongoing dialogue and cooperation between the parties. The three-day limitation of court-arranged mediation is likely to be inadequate for this dispute.[177]

It is suggested that, like the mediation process in the HWCR example, local government initiate the process, forming a team of trained environmental mediators to organise, convene and mediate an informal and voluntary policy dialogue centred on the issues involved. The process is deliberate, planned, inclusive and timely, careful to avoid the shortcomings evident in the PDACG

169 At [14]. "Tangata whenua" means "people of the land" and refers to indigenous Māori people.
170 "Iwi" means "tribe".
171 At [28].
172 At [31].
173 At [34].
174 At [38].
175 At [39].
176 At [46].
177 EC Practice Note 2014, Appendix 2, cl 3(c).

example. Well-designed and well-implemented processes are effective, though the opposite is true where processes are poorly designed and implemented.[178] Finally, like the HWCR example, the intended mediated outcome is an agreement-in-principle submitted to local government with recommendations supported by all stakeholders that could be made into policy.

### 10.2 *Gilderdale v Auckland Council* [2016] NZRMA 131

Mr Gilderdale lodged proceedings in the Environment Court seeking a declaration invoking the statutory defence for strict liability offences under s 341,[179] and allowing the applicant to urgently remove a tree, a large Norfolk Pine, estimated to be over 130 years old on his property.

The tree was scheduled as a notable tree in the Auckland Unitary Plan for its visual appeal and listed as protected. From 2010 there had been a number of incidents of branches breaking off causing significant damage to property and, in one instance, nearly hitting the owner. An independent arborist assessed the tree to be structurally unsound, a view confirmed by the Auckland Council's arborist. The applicant had begun the resource consent application process in 2014 to have the tree removed but due to financial difficulties was unable to proceed. By November 2015 the applicant's finances had improved and he re-engaged the consent process. The arborist was called back and, after inspecting the tree, advised the applicant that Norfolk pines in Auckland were experiencing a season of particularly heavy cone production and his tree was carrying a large crop. The heavy tree limbs were imminently in danger of breaking off causing significant damage, and presenting a very real health and safety risk to all on the property. The arborist recommended the urgent removal of the tree. Alternatives to removal were explored by the applicant but found to be impractical.

In court proceedings, held on 23 December 2015, the Council acknowledged the seriousness of the situation but felt unable to offer consent to the making of a declaration because the applicant had had ample opportunity to apply for resource consent, and the felling of the tree might be used as a precedent for the removal of other listed trees.

Principal Judge Newhook expressed disappointment in the Council's position given the seriousness of the health and safety issues. He noted that because the declaration sought to invoke the statutory defence for strict liability offences under s 341 it was inappropriate for the Court to make the requested declaration because such cases are decided in the District Court. He did make obiter comment to the effect that the removal of the tree was reasonable because

178 M Straube "Report Card on Environmental Dispute Resolution in Utah — Grade: Incomplete but Showing Promise" (2013) 28 JELL 227 at 255.

179 RMA, s 341.

in the circumstances there were clear health and safety risks, as well as risks to property. He did not think the case would set any precedent as every case must stand on its own facts and merits. In the present case the risks to health and safety overrode any anxieties regarding the removal of a notable tree.

*10.2.1 An opportunity for s 99A mediation*

The *Gilderdale* fact scenario is amenable to mediation under s 99A because it involves a consent application. Preferably the applicant would have engaged mediation at the earliest possible instance in 2014 when it was evident the tree presented a problem, but the applicant's finances were low. At this stage mediation may have resulted in an outcome that addressed the issue of the tree and Mr Gilderdale's financial position. By late 2015 mediation was still an option. It was clear to both parties that the exposure to risk continued as long as the situation persisted. The need for resolution by then was urgent. There was common ground in expert opinion. The main issue the parties needed to resolve was precedent. One defining characteristic of mediation is that mediated outcomes do not set precedent; therefore any outcome would not have set a precedent for the removal of listed trees. The only precedent would have been the use of mediation to resolve such disputes.

## 11. RECOMMENDATIONS

To facilitate public engagement in upfront planning decisions and the use of timely, efficient, consistent, and cost-effective processes the overarching recommendation of this article is that local government mediation should be raised to a status equal to, if not greater than, court-arranged mediation. The local government is better positioned to resolve environmental disputes through mediation because local government is responsible for the efficacy of the conditions of any negotiated outcome, is closer in time and location to the dispute, and will likely have an ongoing relationship with any disputants.

Four supporting recommendations are given as follows. First, legislative support by adding a schedule to the RMA for ADR processes. Second, a training programme for legal counsel in environmental dispute resolution. Third, local government mediation needs to be incentivised by making it more affordable than court-arranged mediation and easier to access. Finally, local governments need to build internal capacity for using ADR processes through ensuring mediators are trained in environmental mediation, making mediation expertise accessible, being proactive in its use, and making use of a best-practice forum. A fifth recommendation is that of the Bill's proposed new ss 268, 268A and 290A only the proposed new s 268 should be adopted.

### 11.1 Legislative Support: ADR Schedule

A schedule should be added to the RMA dedicated to ADR processes intended to inform and guide all parties as to the purpose and use of ADR processes under the RMA. The substance can be derived from the Environment Court Practice Note 2014, the Local Government (Auckland Transitional Provisions) Act 2010 and legislation from comparable jurisdictions such as the United States of America and Australia.

Suggested provisions within the schedule are: definitions; purpose; ADR options; when ADR is not to be used; authority of local government and the Environment Court to refer a matter to ADR; duty to participate, including good faith and authority to make decisions; costs; outcomes including agreements, arrangements and side agreements; privilege; confidentiality; matters the parties must give regard to such as pt 2, national policy statements and national environmental standards; and the role and responsibilities of the third party neutral.

The existing s 356 should be repealed,[180] with arbitration included in the new ADR schedule.

### 11.2 Legal Counsel Trained in Environmental Dispute Resolution

Legal counsel working in resource management law need to be trained in environmental dispute resolution so as to understand the unique characteristics of environmental disputes, assess whether a dispute is amenable to mediation, and appropriately advise their client on the ADR options available under the RMA.

### 11.3 Incentivise Local Government Mediation

#### *11.3.1 Make local government mediation more affordable than court-arranged mediation*

The funded model should make local government mediation more affordable for all parties than court-arranged mediation. Presently there is little financial incentive for parties to seek mediation prior to lodging an appeal with the Environment Court because the Court covers the cost of a court-appointed mediator.

180 RMA, s 356.

### *11.3.2 Make local government mediation the easier option*

Local government mediation should be easier to access than court-arranged mediation. This can be done by requiring local government mediation to be attempted before an appeal can be lodged with the Environment Court.

## 11.4 Local Governments to Build ADR Capacity

### *11.4.1 Access to local government mediation expertise, either external or in-house*

Local government needs to develop capacity for environmental mediation through accessing environmental mediation expertise, either externally or in-house.

### *11.4.2 Mediators trained in environmental dispute resolution*

Where necessary, local government will need to ensure that mediators are trained in environmental dispute resolution so as to understand the unique characteristics of environmental disputes, and assess whether a dispute is amenable to mediation. Mediators may be required to take a coordinated team approach to the issue and therefore need to be skilled to work in such a manner.

### *11.4.3 Active in using environmental mediation*

Local government needs to be proactive in using environmental mediation, extending its use to policy-making projects as in the HWCR example. The three-day maximum practice of the Environment Court may not be a helpful guide.[181]

### *11.4.4 ADR Best Practice Forum*

Collaboration among local government can be facilitated through establishing an "ADR Best Practice Forum" with Local Government New Zealand acting as host. The forum can showcase examples such as the Auckland Unitary Plan Independent Hearings Panel's use of expert conferences and mediation, and Environment Canterbury's Alternative Environmental Justice Scheme.

181 EC Practice Note 2014, Appendix 2, cl 3(c).

### 11.5 The Resource Legislation Amendment Bill 2015

*11.5.1 New s 268 to be adopted*

The proposed new s 268 should be adopted because it improves the existing s 268 by bringing the RMA into line with existing Environment Court practice and making the section easier to read.

*11.5.2 New s 268A is unnecessary*

The new s 268A is unnecessary. The arguments are finely balanced, but voluntariness should not give way to expeditious case management. A possible alternative is a provision limiting the Environment Court's discretion to order the parties to an ADR process. For example, in order for the Court to exercise its discretion it must be shown that the issues require greater definition before determination, reasonable belief that any power imbalances between the parties will not affect the negotiations, the matter has no precedent value, and the ADR process will not result in unreasonable increases in delays and costs.

*11.5.3 New s 290A is unnecessary [omitted from Bill 2017]*

The new s 290A is unnecessary. It does not change the Environment Court's existing practice, and therefore provides no incentive for stakeholders to engage earlier in dispute resolution in the consent process. Furthermore, it may add to delays and costs by providing firmer grounds for appealing the Court's ruling.

## 12. CONCLUSION

Society can expect increasing occurrences of environmental disputes around events such as the Havelock North water crisis, and concerns for freshwater resources, urban expansion, climate change and land use. Embodying environmental disputes, the Havelock North water crisis has many issues: solutions are required for the present and future, multiple parties are affected, and interests vary markedly from environmental protection to commercial development. Underlying the crisis are strong elements of public law and public interest. The RMA is New Zealand's principal statutory instrument for managing the environment and related disputes.

The resolution of environmental disputes through mediation and other ADR processes is clearly intended by the RMA. However, local governments make scant use of mediation to resolve policy, plan or consent disputes under the RMA and the option is not publicised. In contrast the Environment Court

refers the majority of appeals from policy, plan or consent decisions by local government to some form of alternative dispute resolution, chiefly mediation. The Court provides clear directions, expert personnel and covers the cost of a court-appointed mediator. Government publications advertise and explain the Court's use of ADR processes. The question is asked: If the Court is directing the majority of decision disputes to mediation, why was mediation not initiated at first instance by local government? The reasons are uncertain but power imbalances and the well-trodden path to the Court are factors. Court processes can result in delays, causing both opportunity and financial loss. However, local governments are closer in time to the dispute and are responsible for the efficacy of the conditions of any negotiated outcome from mediation, court-arranged or not, and therefore are better positioned to initiate mediation that results in best outcomes.

Surprisingly, in view of the Resource Legislation Amendment Bill's policy that processes be timely, efficient, consistent, and cost-effective,[182] the under-utilised provisions for local government mediation remain untouched. Instead the proposed changes, including making participation mandatory, unnecessarily bolster the Environment Court's use of alternative dispute resolution. Comparable jurisdictions furnish instructive examples of legislative support for alternative dispute resolution and case studies of local government environmental mediation. Two recent cases before the Environment Court have recognisable features suggesting local government mediation may have achieved better outcomes for the parties. It is submitted that the use of mediation by local government can shift public engagement to first-instance planning and consent decisions, result in outcomes agreeable to all parties, save time and money, and reduce appeals. The purposes of the RMA, as supported by ADR processes, could be better served through initiatives to build the availability of local government mediation such as adding a new schedule to the Act for alternative dispute resolution, training legal counsel in environmental dispute resolution, incentivising local government mediation, and local governments building capacity for the use of ADR processes. Sadly, the ugly duckling is still the ugly duckling; at present local government mediation for environmental disputes is largely unavailable. Today, Peter Adler's 1990 comment regarding environmental mediation still rings true:[183]

> The challenge today is to build that availability into the system and promote thoughtful use of mediation by the very same protagonists who inevitably come into conflict with each other when important public decisions are being shaped.

182 Resource Legislation Amendment Bill, cl 8.

183 Adler, above n 75, at 79.